ME COURT, U. S.

MAY 22 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

Office-Supreme Court, U.S.
FILED
MAY 22 1969
JOHN F. DAVIS, CLERK

No. 1276

WILLIAM H. ROBERTS,
Petitioner,

v.

WILLIAM J. McDONALD
and
THE CATHOLIC UNIVERSITY OF AMERICA,
Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI. (FILED APRIL 17, 1969)

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INDEX

		Page
I.	INTRODUCTORY STATEMENT	1
II.	THE DECISION BELOW SANCTIONED SUCH AN ABUSE OF DISCRETION BY THE DISTRICT COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION	2
III.	THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT OF CERTIORARI	12
CONCLUSION		16

TABLE OF CASES

American Construction Co. v. Jacksonville, Tampa and Key West Ry. Co.
148 U.S. 372 (1892) 16

Ashwander v. Tennessee Valley Authority
8 F. Supp. 893 (N.D. Ala. 1934) 10

Ballard v. United States
329 U.S. 187 (1946) 13

Bateman v. Ford Motor Co.
310 F.2d 805 (3 Cir. 1962) 4

Brotherhood of Locomotive Engineers v. Missouri-Kansas Texas RR Co.
363 U.S. 528 (1959) 11

Bullen v. De Brettville
239 F.2d 824 (9 Cir. 1956) 4,6

Bullock v. Tamiami Trail Tours, Inc.
266 F.2d 326 (5 Cir. 1959) 3,6

Cox v. Democratic Central Committee of the District of Columbia
200 F.2d 356 (D.C. Cir. 1952) 3

Page

Dalehite v. United States
346 U.S. 15 (1963) 5, 6

Del Vecchio v. Bowers
296 U.S. 280 (1935) 13

District of Columbia v. Pace
320 U.S. 698 (1944) 13

Fisher v. United States
328 U.S. 463 (1946) 12

Galena Oaks Corp. v. Scofield
218 F.2d 217 (5 Cir. 1954) 4

Hanna v. Plumer
380 U.S. 460 (1965) 14

I.C.C. v. Cardinale Trucking Co.
308 F.2d 435 (3 Cir. 1962) 5

Inland Steel v. United States
306 U.S. 153 (1938) 10

Kelley v. Everglades Draining District
319 U.S. 415 (1941) 5, 6

Maas v. United States
371 F.2d 348, 351 (D.C. Cir. 1966) 2, 3

Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States
377 U.S. 235 (1964) 15

The Monrosa v. Carbon Black Export, Inc.
359 U.S. 188 (1959) 14

Poirier v. Welch
233 F. Suppl. 436 (D.C.D.C. 1964) 9, 10

Sears, Roebuck & Co. v. Johnson
219 F.2d 590 (3 Cir. 1955) 3, 6

Shannon v. Retail Clerks Protective Association
128 F.2d 533 (7 Cir. 1942) 5

United Copper Securities Co. v. Amalgamated Copper Co.
244 U.S. 261 (1917) 10

Page

United Milk Products Corp. v. Lovell
75 F.2d 923 (6 Cir. 1935) 10

United States ex rel. Johnson v. First Colored Baptist Church
14 F.2d 296 (D.C. Cir. 1926) 11

United States v. Forness
125 F.2d 928 (2 Cir. 1942) 5

United States v. General Motors Co.
365 U.S. 373 (1945) 16

Woods Construction Co. v. Pool Construction Co.
314 F.2d 405 (10 Cir. 1963) 5, 9

OTHER AUTHORS

Corbin on Contracts 12

Moore, Federal Practice (2d ed. 1966, 1967) 6, 7, 11

Note: "The Supervisory Power of the Federal Courts," 76 *Harvard Law Review* 1956 (1963) 13

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I.

INTRODUCTORY STATEMENT

The Respondents attempted in their Brief in Opposition to the Petition to confuse the issues by completely disregarding *all* questions raised by Petitioner. In their aforesaid attempt to bypass rather than to join the issues before this Court, the Respondents' Brief wished to create the impression that the Petition had been primarily intended to show that the decision below was erroneous. A comparison of the questions presented by Petitioner (Pet. pp. 2-3)[1] and the revised questions presented in the Brief for Respondents in Opposition (Resp.

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[1] The petition for a Writ of Certiorari is referred to herein as "Pet." and the Brief for Respondents as "Resp. B."

B. p. 2) show clearly that the Respondents completely misconceived the thrust of the Petition.

The Reply Brief will primarily be directed to showing (a) that the new issues raised by the Respondents are immaterial and (b) that there are special and important reasons for granting the Writ of Certiorari.

II.

THE DECISION BELOW SANCTIONED SUCH AN ABUSE OF DISCRETION BY THE DISTRICT COURT AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION

1. The Respondents attempt to convey the impression that the scope of review involved in an appeal from the denial of a preliminary injunction is more limited under District of Columbia law than in other jurisdictions which apply the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. In addition, the Respondents attempt to imply that District of Columbia law imposes a particularly" . . . heavy burden . . . upon one to demonstrate that findings of fact are 'clearly erroneous' under Rule 52 of the Federal Rules of Civil Procedure," (Resp. B. p. 5). However, in *Maas v. United States,* 371 F.2d 348, 351 (D.C. Cir. 1966), on which the Respondents rely in their Brief, the Court of Appeals stressed the point that its practice on procedural issues did not differ from the practice of other courts of appeals. However, the Respondents admitted that

> ". . . such a denial [of a preliminary injunction] will not be set aside except for clear error or *an abuse of discretion*" (Resp. B. p. 5) (emphasis added).

The cases cited by the Respondents in this connection show clearly that District of Columbia law and federal

law regarding the scope of review and the burden imposed under the "clearly erroneous" rule pursuant to Rule 52, *Fed. R. Civ. P.* are identical with each other. In *Cox v. Democratic Central Committee, of the District of Columbia,* 200 F.2d 356, (D.C. Cir. 1952) the Court of Appeals said that:

> "It is settled law that *a* Court of Appeals will not set aside the action of *a* District Court in either denying or granting an application for a preliminary injunction unless the action of the District Court was in clear error or *in abuse of discretion*" (emphasis added).

Clearly, in the aforesaid case the Court of Appeals did not intend to fashion a particular local rule but stated simply the settled law generally applied by federal courts of appeal.

The Respondents also relied on *Maas v. United States, supra* where the Court of Appeals stated that:

> "Appellate courts *quite generally* view the grant or denial of a preliminary injunction as resting in the *sound* discretion of the trial court, and limit determination on appeal to whether there has been *'abuse of trial court discretion'*, 'clear error,' 'violation of the rules of equity,' or 'improvident granting' " (emphasis added).

It has been aptly stated that

> "In disturbing a district court's findings of basic facts, this court is guided by the 'clearly erroneous' provision of Rule 52(a). But Rule 52(a) is not applicable where, as here, the dispute is not only to basic facts, but as to what inference (*i.e.*, ultimate fact) should reasonably be derived from the basic facts." *Sears, Roebuck & Co. v. Johnson,* 219 F.2d 590, *591*, (3 Cir. 1955). See also *Bullock v. Tamiami Trail Tours,*

Inc., 266 F.2d 326, 330 (5 Cir. 1959); *Bullen v. De Brettville*, 239 F.2d 824 (9 Cir. 1956); *Galena Oaks Corp. v. Scofield*, 218 F.2d 217, 219 (5 Cir. 1954)..

2. The Respondents also attempted in their Brief to confuse the issues before this Court by making it appear that Petitioner had filed only one Motion for a Preliminary Injunction. In fact, Petitioner had filed two such motions (R. 160-161; 206-207) which were based on entirely different grounds (Pet. pp. 6-7). In addition, Petitioner's second Motion presented new and previously undiscoverable facts (R. 428-440).

The Court of Appeals disregarded completely the fact that the District Court, in its Order of February 8, 1968 (Pet. p. 12a), denying Petitioner's second Motion, failed to file *any* findings of fact or conclusions of law as required by Rule 52(a) of the *Fed. R. Civ. P.* The District Court found it sufficient to say that ". . . plaintiff has failed to make any showing that he is entitled to the extraordinary relief requested . . ." (Pet. p. 12a). Similarly, in its oral remarks on Petitioner's second Motion, the District Court simply said that:

> "I find nothing in the second amended motion that would change the situation as it existed when Judge Sirica ruled and the Court of Appeals ruled on the request to keep the matter in status quo" (Pet. p. 13a).

Clearly, the District Court failed in its aforesaid Order and in its oral remarks to give any indication of the ". . . findings of fact and conclusions of law upon which it predicates its action" *Bateman v. Ford Motor Co.*, 310 F.2d 805, 806, 807 (3 Cir. 1962). Even if the aforementioned oral remarks of the District Court and its aforesaid Order denying Petitioner's second Motion should be considered to imply a reference to the Findings of Fact

and Conclusions of Law filed by the District Court with its Order denying Petitioner's first Motion (Pet. pp. 7a-11a), as they do not, the District Court in its oral remarks and its Order of February 8, 1968 still disregarded the fact that the grounds on which the second Motion had been based were "... fundamentally different from those on which Petitioner had relied in his first Motion" (Pet. p. 7). In addition, and as heretofore stated, Petitioner submitted with his second Motion previously undiscoverable material (R. 428-440) which related to the grounds on which Petitioner's first Motion had been based. Therefore, the oral remarks made by the District Court on February 2, 1968 (Pet. p. 13a) and its Order of February 8, 1968 (Pet. p. 12a) were clearly not in conformity with the requirements of Rule 52(a) *Fed. R. Civ. P.* See *Kelley v. Everglades Draining District,* 319 U.S. 415, 420, 421 (1941); *Dalehite v. U.S.,* 346 U.S. 15, 24 n. 2 (1963); *Woods Construction Co. v. Pool Construction Co.,* 314 F.2d 405, 406 (10 Cir. 1963); *I.C.C. v. Cardinale Trucking Corp.,* 308 F.2d 435, 436, 437 (3 Cir. 1962); *Shannon v. Retail Clerks Protective Association,* 128 F.2d 553, 555 (7 Cir. 1942); *United States v. Forness,* 125 F.2d 928, 930 (2 Cir. 1942).

3. a. The Brief of the Respondents studiously disregards the disposition of Petitioner's second Motion for a Preliminary Injunction by the District Court and also the fact that the *per curiam* memorandum of the Court of Appeals (Pet. pp. 3a-5a) clearly failed to consider Petitioner's appeal from the denial of the aforesaid second Motion. Consequently, the Respondents direct their Brief exclusively to supporting the Findings of Fact and Conclusions of Law which the District Court had filed when it denied Petitioner's first Motion (Resp. B. pp. 5-6). The aforesaid Findings of Fact and Conclusions of Law (Pet. pp. 7a-11a) were a *verbatim* transcript of the clearly self-serving findings suggested by Respondents

which had been filed on November 13, 1967 (Pet. p. 8). Finally, the aforesaid Findings of the District Court were not only a transcript from the suggestions made by the Respondents but they were, in addition, based on an incomplete record (Pet. p. 8).

b. The Respondents believe that "The statement of the Court of Appeals that the Findings are '. . .beyond serious challenge. . .' was an understatement" because they were ". . .based directly upon unimpeached exhibits in the record" (Resp. B. p. 5). Even if the aforesaid statement in the Brief for Respondents were correct, as it is not, the decision below would sanction a gross abuse of discretion by the District Court because the aforesaid Findings were, in so far as they are not conclusions of law, mainly bare statements of ultimate facts and not findings of basic facts as required by Rules 52(a) *Fed. R. Civ. P.* This Court said in *Dalehite v. United States, supra,* that:

> "Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the district court relied. *Kelley v. Everglades Draining District,* 319 U.S. 415, and cases cited. Otherwise, their findings are useless for Appellate purposes."

See also *Sears, Roebuck & Co. v. Johnson supra; Bullock v. Tamiami Trail Tours, Inc., supra.* In addition, the Court of Appeals sanctioned the District Court's abuse of discretion which had failed to base its conclusions of law properly on findings of basic facts. *Bullen v. De Brettville, supra.* Even if the District Court's Findings should erroneously have been considered to be findings of basic facts, these findings would clearly have been "induced by an erroneous view of law" 5 Moore's Federal Practice, (2d ed. 1967), Section 52.03 [2]; p. 2630. In addition, the District Court combined, as will be shown hereinafter,

findings of fact and conclusions of law. Therefore, even from this additional point of view, the findings of fact of the District Court were not binding on the Court of Appeals because there was error as to the law. 5 Moore's Federal Practice, *supra,* p. 2631.

Specifically, (i) Finding of Fact No. 3 (Pet. p. 7a) attempts to construe the Statutes of the Respondent University. It is well settled that the construction and/or interpretation of corporate charters and by-laws is a question of law and not a question of fact. In addition, the aforesaid "finding of fact" is not in conformity with Article 22 of the Statutes of the Respondent University (R. 342);

(ii) The Brief for Respondent, by paraphrasing Findings of Fact No. 7, asserts erroneously that the aforesaid Finding (Pet. p. 8a) related to ". . .the minutes of the meeting of the appropriate faculty members held to discuss the implementation of the establishment of the Institute. . ." (Resp. B. p. 6). Finding of Fact No. 7 was clearly erroneous because the minutes of the meeting of February 5, 1965 show that those in attendance were the principal executive officers of the University and the deans of the schools concerned (R. 374).

Clearly, the last sentence of Finding No. 7 is conclusory in nature. The Court of Appeals sanctioned a gross abuse of discretion by the District Court in approving the latter Court's failure to ascertain the basic facts on which it had based the conclusion that ". . .at said meeting, a plan for the implementation of the Trustees' actions were adopted by those in attendance." (Pet. p. 8a). In fact, the record shows that pursuant to a resolution of Respondent University's Board of Trustees, the purpose of the meeting was to reach ". . .an agreement of record in full acceptance of this [the Trustees'] authorization and approval of the agreements as reached in its implementation" (R. 384; 387).

(iii) Finding of Fact No. 9 (Pet. p. 8a) is conclusory in nature where it refers to the underlying exhibit (R. 410) as supplementing "Plaintiff's appointment." The District Court, when denying Petitioner's second Motion, and the Court of Appeals must have been aware of the fact that the history of the aforesaid exhibit gives rise to serious doubts as to its veracity (R. 431).

(iv) Conclusion of Law No. 1 (Petition 10a-11a) is, in fact, a bare conclusion of an ultimate fact. In the circumstances of the case, and in view of the record before it (R. 212; 504-506), the Court of Appeals sanctioned again the District Court's failure to comply with Rule 52(a), *Fed. R. Civ. P.* The sanctioning of the District Court's clear and gross abuse of discretion by the Court of Appeals is the more serious because the record shows that the Respondent University's Chancellor, Cardinal O'Boyle, stated in the meeting of the Executive Committee of the Board on January 21, 1965, that the resolutions about to be passed were intended to authorize the Respondent University's Rector ". . .to come to a *definitive* understanding. . ." with Petitioner (R. 444) (emphasis added). In addition, the record also shows the statement of the University's Rector that the establishment of the Institute, which included Petitioner's appointment as its Director, were "definite and final" (R. 384).

(v) Conclusion of Law No. 4 (Pet. p. 11a) is, in fact, a negative finding and is, therefore, *per se* not in conformity with Rule 52(a), *Fed. R. Civ. P.* If it is considered to be a conclusion, the District Court failed to find the basic facts on which the aforesaid negative conclusion was based.

(vi) Conclusion of Law No. 5 (Pet. p. 11a) is, if it is relevant at all, already inherent in the aforesaid Conclusion of Law No. 4.

Therefore, the following words of the court in *Woods Construction Co. v. Pool Construction Co., supra,* at 406 are fully applicable here:

> "The most that can be said of these findings is that each is either a conclusion of law, a bare conclusion of ultimate fact or a negative finding. The basic facts necessary to determine the issues in the case do not appear. . ."

c. In Conclusion of Law No. 3 (Pet. p. 11a), the District Court said:

> "That the Court does not have jurisdiction in this case to control the internal management of the University."

The Respondents stated (Resp. B. p. 6) that the aforesaid conclusion of law was sound:

> ". . .involving. . .the familiar principle of local law that the courts will not interfere with the internal operations of corporations or organizations where the challenged actions of said parties are within the constitutions, rules or by-laws of such organizations."

The Respondents rely in their Brief on *Poirier v. Welch,* 233 F. Supp. 436, 439 (D.C.D.C. 1964) where the Court said:

> "This Court may not substitute itself for the Board in determining matters of internal management of the corporation, *unless there is some violation of law or fraud*" (emphasis added).

In fact, Petitioner asserted and clearly showed that the Respondent University (i) had acted unlawfully by violating, to Petitioner's irreparable injury, the legal duties which it owed him pursuant to the contract of February 5, 1965; (ii) that, regardless of the aforesaid con-

tract, the Respondent University had acted unlawfully and to Petitioner's irreparable injury in maliciously, arbitrarily, recklessly and oppressively dissolving the Institute. Thus, the action of Respondent University constituted misconduct which, in view of the fiduciary relationship existing between the parties, was equivalent to a breach of trust. Consequently, the aforesaid acts of the Respondent University were *per se* an abuse of corporate discretion. See *United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 264 (1917). See also *United Milk Products Corp. v. Lovell*, 75 F.2d 923, 927 (6 Cir. 1935); *Ashwander v. Tennessee Valley Authority*, 8 F. Supp. 893, 894 (N.D. Ala. 1934).

Poirier v. Welch, supra, on which the Respondents rely, also said that:

> "...this corporation...though principally a private corporation...has a public interest. The public...has an interest in its activities..."

Specifically, the student body of the Institute had matriculated in the aforesaid Institute in good faith and in reliance on the Respondent University's announcements (R. 489-559). The protection of the aforesaid students from arbitrary and willful action on the part of the Respondent University in dissolving the Institute on eleven weeks' notice and in the middle of an academic year is a public interest which *per se* removes the action of the Respondent University from the shelter of the immunity which the law extends only to lawful and legitimate internal operations of corporations and organizations. In this connection, this Court has said:

> "...that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction may affect." *Inland Steel v. United*

States, 306 U.S. 153, 157 (1939). See also *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas RR Co.*, 363 U.S. 528, 532 (1960); 7 Moore, Federal Practice, *supra*, Sec. 65.04 [1], pp. 1628, 1629.

In claiming immunity for judicial review for the actions of Respondent University, the Respondents also attempt to rely on *United States ex rel Johnson v. First Colored Baptist Church*, 14 F.2d 296 (D.C. Cir. 1926) (Resp. B. p. 6). The aforesaid case deals with the ecclesiastical jurisdiction of the First Colored Baptist Church. In fact, the Court of Appeals said expressly in this connection that "No temporal rights of appellant are involved." Clearly, the Respondents have erroneously relied on the aforementioned case which has no bearing whatsoever on the instant proceedings.

4. The Respondents failed to make any reference to the record when they asserted in their Brief that:

> "The dissolution of the Institute and the transfer of its functions involved only an administrative change in an attempt to solve the various academic and administrative problems which had been experienced and become manifest during the life of the Institute." (Resp. B. 6-7)

In fact, the Record shows that the first attempts to destroy the Institute were made on February 21, 1965, *i.e.*, sixteen days after the agreement of February 5, 1965, had been signed and nearly seven months prior to the commencement of the Institute's operations (R. 321-325). Therefore, the attempted dissolution was in no way related to ". . .problems which had been experienced and become manifest during the life of the Institute" (Resp. B. p. 7). The actual reason for the attempted dissolution of the Institute was stated by the Executive

Vice President of the Respondent University when he said that "Anyway, if we had waited longer, the Institute would have become too strong to be disestablished" (R. 481).

5. The Respondents make another attempt to confuse the issues when they advance their ever-repeated argument "...that equity will decline to specifically enforce a personal service contract where the remedy is not mutual." (Resp. B. p. 7) Clearly, the very attempt of the Respondent University to dissolve the Institute shows that the underlying contract is not a personal service contract. In addition, it is well settled that mutuality of remedy is not necessary (a) "in cases of enforcement by injunction" 5A Corbin on Contracts, Sec. 1188; and (b) "in cases where the decree can properly be made contingent on performance by the plaintiff" Corbin, *supra*, Sec. 1190.

III.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Respondents assert that

> "This court has on many occasions commented to the effect that it will not ordinarily review the decisions of the United States Court of Appeals for the District of Columbia Circuit in cases which are based upon the statutes or common law of the District of Columbia" (Resp. B. pp. 7-8).

However, the Respondents failed to say that the cases upon which they relied, qualify essentially and narrow severely the aforesaid general statement. In *Fisher v. United States*, 328 U.S. 463, 476 (1946) this Court said:

> "Our policy is not to interfere with the local rules of law which they [the Court of Appeals for the

> District of Columbia] fashion, *save in exceptional situations where egregious error has been committed*" (emphasis added).

In *Del Vecchio v. Bowers,* 296 U.S. 280, 285 (1935) this Court said:

> "We will not *ordinarily* review decisions of the U.S. Court of Appeals [of the District of Columbia]..." (emphasis added). See also *District of Columbia v. Pace,* 320 U.S. 698, 702 (1944).

The Petitioner submits that he has presented to this Court an extraordinary and exceptional situation in regard to which he has, *inter alia,* invoked the supervisory powers of this Court. The aforesaid supervisory powers over courts of appeal have even been exercised by this Court when the rights of the parties were not as gravely injured and impaired as, in effect, they are in the instant case. In this connection the following words of this Court apply:

> "The injury is not limited to the Defendant-there is injury...to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard v. United States,* 329 U.S. 187, 195 (1946).

Commenting on this case it has been said that

> "Clearly, therefore, the reviewing court may, under the supervisory powers, shift its focus from the adjudication of the parties' rights to a more general investigation of judicial procedures affecting a more comprehensive kind of supervision than had seemed possible under earlier doctrines." Note, The Supervisory Power of the Federal Courts, 76 Harvard Law Review 1656, 1657 (1963).

Clearly, this is more the case if the questions, as in the instant case, are presented "...in the context of meaningful litigation" *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 188, 184 (1959).

Also, the supervisory powers of this Court have always been exercised whenever a "...threat to the goal of uniformity of federal procedure [was] posed by the decision below..." *Hanna v. Plumer*, 380 U.S. 460, 463 (1965).

2. The Respondents urge upon this Court that the Writ be denied because

> a. "This case is of no importance save to the parties" (Resp. B. p. 8). Clearly, this statement of the Respondents has no foundation in the record which shows exactly the contrary, namely that approximately 100 faculty members and students are involved (R. 456-563).
>
> b. "It [the case] involves only a discretionary decision based upon local law and the particular facts involved and will not serve as a precedent particularly in view of the fact that the opinion of the Court of Appeals was unprinted and unreported."

As far as the first part of the aforesaid sentence is concerned, the Respondents seem to have overlooked the fact that the Petition (pp. 6-15) submitted questions which pertain to the construction of federal rules of procedure by the District Court for the District of Columbia and by the Court of Appeals. As heretofore stated on this page, the questions which were raised in the Petition have a direct and immediate bearing on "...the goal of uniformity of federal procedure..." *Hanna v. Plumer, supra,* regardless of whether or not the Court of Appeals acted in its capacity as a federal court

or in its local capacity. In fact, the Court of Appeals has been clearly aware of the fact that its practice in questions of federal procedure is of national importance regardless of whether it acts on an appeal from a decision of the District Court in its federal or in its local capacity.

In addition, and, specifically, in regard to the questions raised by Petitioner as to the conformity of the General Rules of the Court of Appeals with the Federal Rules of Appellate Procedure, this Court has regularly granted writs of certiorari when, as in the instant case, "...a considerable number of suits are pending in the lower courts which will turn on resolution of these issues..." *Massachusetts Trustees of Eastern Gas and Fuel Associates v. United States,* 377 U.S. 235, 237 (1964).

In regard to the second part of the aforementioned sentence in the Brief for Respondents, namely that "It [the case]...will not serve as a precedent, particularly in view of the fact that the opinion of the Court of Appeals was unprinted and unreported," the Respondents seem to suggest to this Court that the determination of a court of appeals as to whether an opinion shall be printed or not should guide this Court in granting or denying a writ of certiorari. If this point of view were accepted, courts of appeals would arrogate to themselves the power to preempt or, at least, to influence this Court's prerogatives in granting or denying writs of certiorari.

c. Finally, Petitioner submits that today the question of the scope of immunity of colleges and universities from judicial review, which the instant case raises, is also of national importance.

d. Finally, the Writ should be granted because the questions raised in the Petition are "fundamental to the

future conduct of the case" *United States v. General Motors Co.*, 365 U.S. 373, 377 (1945). See also *American Construction Co. v. Jacksonville, Tampa and Key West Ry. Co.*, 148 U.S. 372, 384 (1892).

CONCLUSION

The instant case manifestly involves

a. Important federal questions which have not been, but should be, settled by this Court; b. A decision by the Court of Appeals which is clearly in conflict with applicable decisions of this Court and the decisions of other courts of appeals on the same matter; c. Special and important reasons for exercising this Court's supervisory powers over the Court of Appeals; d. A clear-cut and fundamental issue of law, namely that of the scope of immunity of universities from judicial review; e. Departure from the accepted and usual course of judicial proceedings by sanctioning the abuse of discretion by the District Court.

Accordingly, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM H. ROBERTS
Petitioner *pro se*